

01257

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-185659

DATE: November 2, 1976

MATTER OF: United Southeastern Tribes, Inc.

DIGEST:

1. Protest filed after award which, in part, raises issue of eligibility of Office of Native American Programs' grantee to receive Federal funds is untimely and not for consideration. Under Bid Protest Procedures improprieties apparent in solicitation must be protested prior to closing date for receipt of initial proposals. However, since underlying question of eligibility of Lumbees to receive Federal grants funds under specific ONAP program raises broader question of funding under Native American Programs Act of 1974, matter is not governed by Bid Protest Procedures and will be considered as separate case. Comments from interested parties are solicited.
2. Protest filed after award that solicitation was designed to prevent protester from obtaining award due to provisions in solicitation is untimely and not for consideration on merits under Bid Protest Procedures because protest against alleged impropriety apparent in solicitation prior to initial closing date for receipt of proposals must be filed prior to initial closing date for receipt of proposals.
3. GAO reviews protests against affirmative determinations of responsibility only where, unlike here, there are allegations of fraud or failure to apply definitive criteria of responsibility.
4. Where agency has pointed out deficiency in proposal and afforded offeror opportunity to revise proposal, discussions are meaningful. Agency refusal to negotiate alternate method to provide required assistance to one of 40 grantees of Office of Native American Programs specifically listed in solicitation, after indicating unacceptability of exception in proposal to provide such services, coupled with opportunity to submit revised proposal, was proper.

United Southeastern Tribes, Inc. (USET), has protested the rejection, by the Department of Health, Education, and Welfare (HEW), Office of Human Development, of USET's proposal to provide training and technical assistance to 40 grantees of the Office of Native American Programs (ONAP).

Request for proposals (RFP) OHD-105-76-6100 listed the ONAP grantees to be served, including the Lumbee Regional Development Association, Inc. (LRDA). Of the eight proposals submitted, two were found to be within the competitive range--USET and Development Associates, Inc. Negotiations were conducted with both firms between December 1 and 10, 1975.

The contracting officer reports that, at the negotiation session with USET on December 3, it became apparent that USET did not intend to provide any assistance to the LRDA. Instead, USET suggested that assistance to the LRDA should be furnished by a contractor from another geographical region. Further discussions confirmed that USET would not service the LRDA. USET was informed by the contracting officer that failure to agree to provide the requisite services to the LRDA would result in rejection of USET's proposal. Since USET did not recant, contract HEW105-76-6100 was awarded to Development Associates on December 11, 1975, in the estimated amount of \$389,532.

USET has advanced four basic grounds of protest. First, USET contends that Public Law (P.L.) 84-570, June 7, 1956, prohibited the ONAP grant to the Lumbees by precluding the expenditure of appropriated funds earmarked for Indians on the Lumbees under the criteria for eligibility in the Native American Programs Act of 1973, P.L. 93-644, 42 U.S.C. § 2991, *et seq.* (Supp. IV, 1974), which is title VIII of the Headstart, Economic Opportunity and Community Partnership Act of 1974. Therefore, the USET proposal should not have been rejected for refusal to serve the Lumbees.

Second, USET maintains that the RFP was designed to preclude USET from obtaining the award. USET bases this contention on the fact that prior to drafting the RFP, ONAP was aware of USET's opposition to furnishing any services to the Lumbees. Thus, the inclusion of the requirement to serve the Lumbees is viewed by USET as a deliberate obstruction to USET's chance to be the successful proposer.

P-185659

Third, USET states that it was not given a fair opportunity to engage in meaningful negotiations, in light of ONAP's refusal to consider alternate proposals from USET to have other concerns serve the Lumbees in exchange for USET serving other grantees in another region. Also, USET complains that ONAP waited until the last moment to raise the matter of USET's objection to serving the Lumbees. Since the governing body of USET is composed of representatives of various tribes and requires time to formulate policy pronouncements, USET could not take effective action in the timeframe allotted.

Fourth, USET charges that Development Associates was not a qualified Indian proposer under the guidelines orally promised in other meetings.

Considering the arguments in inverse order, USET is challenging Development Associates' qualifications to perform the contract. Development Associates was determined by the contracting officer to be a responsible firm. Our Office has ceased reviewing affirmative determinations of responsibility, absent any allegation of fraud or failure to apply definitive criteria of responsibility. UTL Corporation, B-185832, March 30, 1976, 76-1 CPD 209. There was no requirement in the RFP that the contractor be an Indian organization. Therefore, this contention will not be considered on the merits.

As for whether the final negotiations were meaningful, the record indicates that the negotiations covered a variety of topics, one of which was the statement in USET's proposal involving Lumbees, a clear exception to the specifications stated in the RFP, which ONAP was not required to accept. Moreover, to have accepted USET's exception to the specifications would have required amending the solicitation and reopening negotiations with all firms.

We consider the negotiations to be meaningful if an offeror is advised of proposal deficiencies, and is given a reasonable opportunity to correct or resolve the deficiencies by the submission of such technical, price or cost revisions that may result from the discussions. RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99, and cases cited therein. Here, the deficiency in USET's proposal was pointed out and discussed. USET was given the opportunity to revise the proposal to remove the exception, but chose not to--a matter of business judgment. However, the fact that USET did not avail itself of the opportunity does not impact on the propriety of the discussions which we believe were meaningful under the above standard.

Also, because of USET's position of refusal to serve the LRDA under any circumstance, it is apparent that the timeframe allotted for consideration of the ONAP objection to this position was of no consequence.

With respect to the USET charge that the RFP was designed to prevent USET from being the successful offeror, section 20.2(b)(1) of our Bid Protest Procedures (Procedures), 4 C.F.R. part 20 (1976), requires that any protest based upon an alleged impropriety apparent in a solicitation must be filed before the closing date for receipt of initial proposals. Clearly, the RFP requirement to provide training and technical assistance to the LRDA was apparent prior to the closing date for receipt of initial proposals. USET's protest, on this point, was not filed until after award was made. Therefore, the protest on this point is untimely and will not be considered on the merits.

Finally, USET argues that the rejection of its proposal was improper because expending funds earmarked for Indians on the LRDA is illegal, citing Public Law 84-570, 70 Stat. 254 (1956), entitled "An Act Relating to the Lumbee Indians of North Carolina," which reads, in pertinent part, as follows:

"* * * That the Indians now residing in Robeson and adjoining counties of North Carolina, originally found by the first white settlers on the Lumbee River in Robeson County, and claiming joint descent from remnants of early American colonists and certain tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after the ratification of this Act, be known and designated as Lumbee Indians of North Carolina and shall continue to enjoy all rights, privileges, and immunities enjoyed by them as citizens of the State of North Carolina and of the United States as they enjoyed before the enactment of this Act, and shall continue to be subject to all the obligations and duties of such citizens under the laws of the State of North Carolina and the United States. Nothing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians." (Emphasis added.)

B-185659

USET interprets the act to mean that the Lumbee people are prohibited from receiving any Federal services which are given because of the recipient's status as Indians. Therefore, USET concludes, no program, service, or assistance, set aside for Indians should benefit the Lumbees. Thus, if the initial grant to the Lumbees by ONAP is prohibited by P.L. 84-570, then requiring USET to provide that grantee with training and technical assistance is, likewise, prohibited.

This argument is essentially a protest against a condition stated in the RFP which was apparent prior to the initial closing date for receipt of proposals. This basis of protest is untimely for the same reason the preceding issue is untimely. 4 C.F.R. § 20.2(b)(1) (1976). In view of this and the foregoing, the protest is denied.

However, the underlying question is one of eligibility of the Lumbees to receive Federal funds under a specific ONAP program. This, in turn, raises a question of broad application--whether non-federally recognized Indians or terminated Indians are eligible for programs funded under the Native American Programs Act of 1974, or other legislation aimed at benefitting Indians. This consideration is not governed by our Bid Protest Procedures and is not appropriately considered thereunder. Consequently, we will consider this question further as a separate case. By separate letter of today, we are notifying interested parties of this further inquiry and are soliciting their comments.

for the


Comptroller General
of the United States